The learned Deputy also referred to the judgment of Thomson J. in Ipoh Criminal Appeal No. 33 of 1953 (not reported), *Deputy Public Prosecutor v. Dollah bin Aziz*[3] and *Penny v. Nicholas*[4].

Having considered the evidence given in the Court below, the judgment of the learned Magistrate and the arguments of Counsel before me in this appeal, I have come to the conclusion that the appellant was rightly convicted by the learned Magistrate of the offence with which he was charged. The evidence of the first prosecution witness, Ali bin Haji Hassan, Inspector of Weights and Measures, Johore, as to the weigh-bridge at Segamat Police Station, was rightly accepted by the learned Magistrate as *'prima facie'* evidence of the correctness of any weight recorded by same and in particular the weight of the centre axle recorded by Inspector Wilson Paul, the second prosecution witness. That being so and bearing in mind that regulation 3(c)(ii) was an absolute prohibition, the prosecution had made out a case which, if unrebutted, would warrant a conviction, and as the appellant refrained from entering upon his defence, he was rightly convicted. The questions raised in *Sim Ah Man v. Public Prosecutor*[1] in a case under regulation 3(c)(ii) do not arise, as stated by the learned Magistrate in his well reasoned judgment, as the regulation only refers to the 'axle weight' and not to the weight of the vehicle.

As to the sentence, I do not consider it is excessive.

The appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: *Braga & de Souza.*

SP. PONNIAH PILLAY v. SENTHAMARAI d/o VELLASAMY.

[O. C. J. (Buhagiar J.) March 20, 1954]

[Ipoh — Originating Summons No. 202 of 1953]

Guardianship of infant — Illegitimate child — Hindu law — Welfare of infant shall be primary consideration — Civil Law Enactment, 1937, s. 6(i) applied.

This was an originating summons in which the applicant applied for the custody of his infant child by the respondent. It appeared that the parties were of Indian nationality, of Hindu religion and that they were not legally married. Counsel for the applicant submitted that the matter in this case shall be governed by Hindu law and referred to the Hindu law on the subject of the custody of illegitimate children.

Held: (1) under s. 6(i) of the Civil Law Enactment, English law applied to cases relating to custody and control of infants but regard is to be had to the religion and customs of the parties, and such modifications are to be made as are necessary to prevent it from operating unjustly and oppressively; (2) the religion and customs of the parties cannot have the effect of ousting the principles of English law: they can only have the effect of modifying it, in so far only as may be necessary to fit the circumstances of each case; (3) according to the authorities on Hindu law it did not appear that the father of an illegitimate child has an absolute right to the custody of the child, but whatever his rights are, the primary consideration in cases of this nature should be the welfare of the infant; (4) in this case it is for the welfare of the child that the respondent should have the custody thereof.

Cases referred to:—

(1) *Ong Cheng Neo v. Yeap Cheah Neo & Ors.* L.R. 6 P.C. 381; 1 Ky. 326.

(2) *Choa Choon Neoh v. Spottiswoode* 1 Ky. 216.

(3) *Re Sinyak Rayoon & Anor.* 4 Ky. 329.

(4) *Mt. Parem Kaur & Ors. v. Banarsi Das* A.I.R. 1934 Lahore 1003.

(5) *Barbardo v. McHugh* (1891) A.C. 388.

(6) *In re O'Hara* (1900) 1 I.R. 232, 239.

(7) *In re Carrol* (1931) 1 K.B. 317.

(8) *Ex parte Knee* 1 B. & P.N.R. 148.

APPLICATION for custody of infant.

N. Sharma for the applicant.

A. R. H. Thomas for the respondent.

Cur. Adv. Vult.

Buhagiar J. : — In this Originating Summons adjourned for hearing in open Court SP. Ponniah Pillay is applying for the custody of his infant child, Murugappan, by the respondent, Senthamarai. It was admitted by the parties that they are of Indian nationality, of Hindu religion, and that they are not legally married. The affidavits of the applicant and the respondent show that they lived together from 1948 until the 12th August, 1953; the infant Murugappan, was born on the 29th March, 1949.

From the evidence on record it appears that for some time the respondent thought that she was lawfully married to the applicant according to Hindu rites and customs and that when she realised in August, 1953, that she was only his mistress she left him, and went to live with her sister, who is married to one Ramaiah and has three children. Attempts by the Arbitration Board (Indian Section), Social Welfare Department, Teluk Anson, to bring about a reconciliation were unsuccessful.

Some time in 1951 (about April) the applicant went to India with the respondent and the infant Murugappan. He was away for about four months; he married in India and returned to Malaya with his wife; there is now a daughter from this marriage.

The infant has been with the respondent's sister and brother-in-law for 3 or 4 years; the respondent used to take him to the applicant's house occasionally

for two days or so and has never been with the applicant for any length of time except for the period of four months when the applicant was in India in 1951.

The applicant's wife does not seem to have acted favourably towards the infant. The respondent is not doing any work except helping her sister in house-keeping. Ramaiah is providing food and clothing for the respondent and the infant and has been doing so for the infant during the time that the infant has been with him and his wife. The infant seems happy in Ramaiah's house and calls Ramaiah "Aya" (father) just as his own children do. Ramaiah is willing to go on having them in his house and supporting the respondent and the infant; he says he can afford to do so as his salary is about $460 per mensem and one of his children is working and earning $100 per mensem.

In his affidavit dated the 2nd November, 1953, in support of the Originating Summons, the applicant states that the respondent's conduct is very suspicious as she is living alone at Blenham Estate, Bagan Datoh, and that, from what her sister says, she is arranging to live with another man; that the respondent is neglecting to look after the infant properly and he heard that he is being underfed; that he is a licensed money-lender, a man of sound financial standing and a Federal Citizen, and that as he has only one son he is in a position to maintain him and bring him up as a good citizen.

There is no substance in the allegations about the respondent's conduct and the treatment of the infant; on the contrary, there is evidence to show that the respondent is living a decent life with her sister and brother-in-law, that the infant is happy and appears to be well looked after. The respondent is not financially independent and there are proceedings pending for maintenance of the child.

Mr. N. Sharma, counsel for the applicant, stated at the hearing that the applicant would agree to put the child in an educational institution and was prepared to give $200 per mensem towards his education.

With regard to the law, Mr. Sharma submitted that this case is governed by section 6(i) of the Civil Law Enactment, 1937 (F.M.S. Enactment No. 3 of 1937) which provides as follows:—

"In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the commencement of this Enactment regard being had to the religion and customs of the parties concerned, unless in any case other provision is or shall be made by any written law."

If I understood Mr. Sharma's arguments correctly, his submission is that in view of the concluding words of that sub-section the matter in this case should be governed by Hindu Law. I do not consider that the effect of the words "having regard to the religion and customs of the parties concerned" in section 6(i) of the Civil Law Enactment, 1937, is to exclude completely the application of English law when such religion and customs are different from or in conflict with the principles of English law. In my opinion those words have the same effect as the words "so far as circumstances will admit" used in the Letters Patent of 1826 and 1855 which introduced the Law of England into the Colony of the Straits Settlements. In *Ong Cheng Neo v. Yeap Cheah Neo & Ors.*[1], the Judicial Committee of the Privy Council approved the expressions used by Sir Benson Maxwell C.J., in the case of *Choa Choon Neoh v. Spottiswoode*[2], where he said (at p. 221):—

"In this Colony so much of the Law of England as was in existence when it was imported here and is of general (and not merely of local) policy and adapted to the conditions and wants of the inhabitants, is the law of the land, and further that law is subject, in its application to the various alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them."

Adopting these principles, in *Re Sinyak Rayoon & Anor.*[3], Pellereau J., said (at p. 332):—

"I hold in consequence that in the selection of such guardians the Court should apply the law of England, and in doing so, should consider the circumstances of each case, the interest and welfare of the infants, their treatment, their sex, their education, the religion of their parents and the rules which, according to that religion, regulate their domestic customs and relations. Each case must necessarily stand on its own grounds, and it is a beneficial character of the law, such as I hold it to be, that its elasticity allows the Judge in matters of guardianship to take into account, in the interests of the infants, the varied circumstances of their position."

Similarly, under section 6(i) of the Civil Law Enactment, English law applies to cases relating to custody and control of infants but regard is to be had to the religion and customs of the parties, and such modifications are to be made "as are necessary to prevent it from operating unjustly and oppressively." The religion and customs of the parties cannot have the effect of ousting the principles of English law; they can only have the effect of modifying it, in so far only as may be necessary to fit the circumstances of each case.

With regard to Hindu Law on the subject of illegitimate children, Counsel for the applicant referred me to *Mulla's Principles of Hindu Law,* 11th Ed. p. 615, and to the Indian Case of *Mt. Parem Kaur & Ors. v. Banarsi Das*[4]. The Hindu Law on this subject is adequately summarised in the following statement by *Mayne* on *Hindu Law and Usage,* 10th Ed. p. 305, para. 235:—

"The mother is the natural guardian of an illegitimate child. But the putative father on whom the obligation to maintain falls has *prima facie* the preferential right to the custody. Where the mother has allowed the child to be separated from her and brought up by the father, or by persons appointed by him, the Court

will not allow her to enforce her rights, especially if the result would be disadvantageous to the child by depriving it of the advantages of a higher mode of life and education. Her own continued immorality would of itself be a sufficient reason against handing over to her a child which was otherwise properly provided for."

It may here be pointed out that the obligation of the putative father to maintain the child arises under section 488 of the Indian Criminal Procedure Code, whose provisions are similar to those in section 3 of the local Married Women and Children (Maintenance) Ordinance, 1950 (No. 36 of 1950). I mention this because there are statements in English law books which are taken to be authority for the proposition that in English law the right of a mother to the custody of her illegitimate child arises out of her obligation to maintain her child — formerly under the Poor Laws and now under the National Assistance Act, 1948. This is correct only in so far as the rights of the mother at *common law* are concerned. But as Lord Herschell in *Barbardo v. McHugh*[5], stated (at p. 398) :—

"It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the Courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction."

The fact, therefore, that under the local law the putative father may be liable to maintain an illegitimate child does not necessarily give him the right of custody.

In English law the father of an illegitimate child, so long as the child remains illegitimate, is not generally recognised for civil purposes; he is under no obligation to provide for the child, in the absence of an affiliation order, unless he had adopted it *de facto* or obtained an adoption order; unless he has obtained an adoption order he has no right to the custody of the child, even though he is in a better position to maintain it; the Court will protect his right whenever he is in lawful custody of the child. (*Halsbury's Laws of England*, 3rd Ed. Vol. 3 at pp. 108, 109). The mother of an illegitimate child has *prima facie* the right of custody and when questions on custody arise the wishes of the mother are to be taken into account but the welfare of the infant is the first and paramount consideration. The principles of law to be used in determining questions of custody are stated with great clarity by FitzGibbon L.J., in *In re O'Hara*[6], quoted with approval in *In re Carrol*[7] as follows :—

"At Common Law, the parent has an absolute right to the custody of a child of tender years, unless he or she has forfeited it by certain sorts of misconduct. Chancery, when a separate tribunal, possessed a jurisdiction different from that of Queen's Bench, and essentially parental, in the exercise of which the main consideration was the welfare of the child, and the Court did what, on consideration of all the circumstances, it was judicially satisfied that a wise parent, acting for the true interests of the child, would or ought to do, even though the natural parent desired and had the Common Law right to do otherwise, and had not been guilty of misconduct. The Judicature Act has made it the duty of every Division of the High Court to exercise the Chancery jurisdiction. In exercising the jurisdiction to control or ignore the parental right the Court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

In the present case, the child is four years old, well looked after and happy in his surroundings; he does not know his father, the applicant, as he has not lived with him even when the respondent was with the applicant; except for the period when the applicant was in India, the child was not with the applicant except for very short intervals. I think it is also important to point out that the applicant has a wife who, as a step-mother, cannot give the same affection to the child as the natural mother.

The applicant does not seem to have missed his son in the past; he has not even provided food and clothing for him. The only factor in favour of the applicant is his financial prosperity; apart, however, from the fact that the mother is entitled to the custody of her infant child in preference to the father, though from his circumstances he may be better able to educate it (*Ex parte Knee*[8]), I do not think that this is sufficient to outweigh the benefits of affection and care of his mother especially at the present tender age of the child. Adopting the principles of English law, I consider that it is for the welfare of the child that the respondent should have the custody thereof.

According to the authorities on Hindu Law it does not appear that the father of an illegitimate child has an absolute right to the custody of the child; but whatever his rights are, I think it is a sound principle that the primary consideration in cases of this nature should be the welfare of the child, and it does seem to me that English law requires modification to prevent it from operating unjustly or oppressively in this case.

The application should be dismissed with costs.

Application dismissed.

Solicitors : *S. M. Sharma; Lovelace & Hastings.*

Re NG SAY TEE; OFFICIAL ASSIGNEE, F.M. v. MANMOHAN SINGH.

[O. C. J. (Thomson J.) March 26, 1954]

[Ipoh — Bankruptcy No. 29 of 1953]

Bankruptcy — Secured creditor taking proceedings outside the bankruptcy — Bankruptcy Enactment, s. 9(ii) — Procedure.

The bankrupt had previously to his bankruptcy executed a mortgage of his share in a residuary estate to the creditor on a loan. The creditor took out proceedings against the Official Assignee for payment of the